



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-051



**Sefraoui
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before: Judge Kamaljit Singh Garewal, Presiding
Judge Inés Weinberg de Roca
Judge Jean Courtial

Judgment No.: 2010-UNAT-048

Date: 1 July 2010

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Self-represented

Counsel for Appellant/Respondent: John Stompor

JUDGE KAMALJIT SINGH GAREWAL, Presiding.

Synopsis

1. This appeal has been filed by the Secretary-General against a judgment of the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) which was in fact in favour of the Secretary-General. The appeal is not receivable and is dismissed.

Facts and Procedure

2. Azzedine Sefraoui (Sefraoui), a P-3 level Arabic translator with the Arabic Translation Service, was one of the candidates for two P-4 positions of Arabic Reviser. These posts had been advertised on 10 August 2007 with 9 October 2007 as the closing date. On 3 December 2007, Sefraoui was informed that he had not been selected for either of the two posts.

3. Sefraoui challenged the decision before the UNDT on the ground that he had not been properly considered for the posts. He also claimed that the interview panel was biased against him. On 24 December 2009, the UNDT dismissed the application, finding that “[t]he preponderance of evidence demonstrates that [Sefraoui’s] candidature was given full and fair consideration”.

4. The Secretary-General appeals against the UNDT Judgment to seek a clarification of the *ratio* of the Judgment with regard to the way in which the UNDT has applied the principle of preponderance of evidence and ignored the Secretary-General’s submissions on the basis of “minimal showing” that Sefraoui had been fairly considered. The UNDT had drawn a distinction between the rule enunciated by the UNDT in *Bye*¹ “that the party who alleges a fact bears in principle the burden of proving its veracity” and the rule laid down by the former Administrative Tribunal in Judgment No. 362, *Williamson* (1986) that “the burden of establishing the Administration’s failure to consider (the applicant’s) candidacy does not fall upon him. If once called seriously into question, the Administration must be

¹ *Bye v. Secretary-General of the United Nations*, Judgment No. UNDT/2009/083, para. 59.

able to make at least a minimal showing that the staff member's statutory right was honoured in good faith in that the Administration gave 'the fullest regard' to it."²

5. Sefraoui filed no answer to the appeal.

Submissions

Secretary-General's Appeal

6. The Secretary-General raises several legal contentions and alleges at least five errors of law. The submissions are interconnected. The Secretary-General submits that although the outcome of the case was correct, the way in which the principle of preponderance of probability was applied by the UNDT departed from the settled jurisprudence.

7. The UNDT erred in finding that there was a contradiction between the two distinct lines of jurisprudence of the former Administrative Tribunal regarding the standards for reviewing challenges to selection decisions and claims of prejudice or other improper motives. The UNDT failed to uphold that the Administration may demonstrate that a candidate received full and fair consideration for a post by making at least a minimal showing (the minimal showing principle). The UNDT erred in failing to hold that the burden of proving prejudice or improper motivation rests with the party making the allegation (the burden of proof principle). The UNDT did not accept the jurisprudence of the former Administrative Tribunal in this case, whereas no such departure was intended as part of the reform of the administration of justice system. The Administration made at least a minimal showing that the candidate had been fully and fairly considered.

8. It should be noted that the former Administrative Tribunal held that all candidates were entitled to "full and fair" consideration during a selection process. In cases where a staff member claimed that he or she was not properly considered for a post, the Administration bore the initial burden of proof; it must make at least a minimal showing that the staff member's statutory right was honoured in good faith in that the Administration gave the "fullest regard" to it. The former Administrative Tribunal also held that the exercise of the discretionary authority by the Secretary-General in matters of staff selection must not

² Paragraph VII.

be tainted by prejudice or other extraneous factors. However, the initial burden of proving prejudice or improper motivation rested with the party making such allegations.

9. The Secretary-General submits that on the basis of the minimal showing principle and the burden of proof principle enunciated by the former Administrative Tribunal, the Administration devised and followed elaborate steps for analyzing a challenge to a selection decision, and United Nations' officials take into account the established and consistent jurisprudence of the former Administrative Tribunal as part of their decision-making.

10. However, the Dispute Tribunal questioned the utility of the former Administrative Tribunal Judgment No. 362, *Williamson* (1986) rendered by the former Administrative Tribunal and, by implication, its progeny, as it found itself bewildered by the term "minimal showing" in *Williamson*. It also found the language in the former Administrative Tribunal Judgments No. 447, *Abbas* (1989) and No. 1188, *Agbele* (2004) confusing and unhelpful.

11. The Secretary-General stresses that the propensity of the Dispute Tribunal to ignore the former Administrative Tribunal's jurisprudence is troubling, not only because such a dramatic change was not envisaged by the General Assembly, but also because of its grave implications for the rule of law. He maintains that it would be untenable to hold United Nations' officials liable for not complying with the former Administrative Tribunal's jurisprudence in some cases and for acting in reliance on established jurisprudence in others.

12. The Secretary-General recalls that the long-established jurisprudence of the former Administrative Tribunal has been expressly recognized and consistently upheld by the Dispute Tribunal in its judgments, with the exception of *Sefraoui*.

13. In the view of the Secretary-General, the conclusion reached by the Dispute Tribunal that the general rule should be that the case is determined by the preponderance of evidence means essentially that any allegation provides a basis for a justiciable claim. This creative standard places the Administration in an untenable position of having to assert and prove a negative matter, without requiring the alleging party to formulate his or her allegations with any specificity or to provide any evidence in support of them. The preponderance of evidence standard from the *Sefraoui* Judgment has no legal basis and represents a

significant departure from the jurisprudence of the former Administrative Tribunal. A departure from an established and consistent body of jurisprudence should be taken only when there are compelling reasons to do so, which was not the case in *Sefraoui*.

14. The Secretary-General respectfully requests that this Tribunal uphold and confirm the applicability of the minimal showing principle and the burden of proof principle of the former Administrative Tribunal. He also respectfully requests that this Tribunal uphold the Dispute Tribunal's conclusion that Sefraoui had received full and fair consideration for the posts and that Sefraoui's application should be dismissed.

Sefraoui's Answer

15. As noted above, Sefraoui has provided no answer to the appeal.

Considerations

16. Sefraoui challenged his rejection by the selection panel for appointment to one of the two posts of P-4 level Arabic Adviser. The main ground for Sefraoui's application before the UNDT was that he had not been fully and fairly considered. The UNDT came to the conclusion that "the preponderance of evidence demonstrates that [Sefraoui's] candidature was given full and fair consideration".

17. The UNDT dismissed Sefraoui's application. The Secretary-General appealed the Judgment, even though it was in his favour, on the ground that the UNDT made several errors in law. Sefraoui did not file an appeal nor did he file an answer to the Secretary-General's appeal.

18. We do not examine the legal submissions in this appeal. A party in whose favour a case has been decided is not permitted to appeal against the judgment on legal or academic grounds. None of the grounds of appeal pleaded in the present appeal are valid grounds under Article 2 (1) of the Appeals Tribunal's Statute. Therefore, the appeal is not receivable under Article 7 (1) of the Appeals Tribunal's Statute.

Judgment

19. The appeal is dismissed.

Dated this 1st day of July 2010 in New York, United States.

Original: English

(Signed)

Judge Garewal, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Courtial

Entered in the Register on this 17th day of August 2010 in New York, United States.

(Signed)

Weicheng Lin, Registrar
United Nations Appeals Tribunal